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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

vs.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE and ROBERT BULLINGTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner, L. Verdelle Clark, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, entered on the verdict of a jury in favor of defendants.

This cause is brought under the Civil Rights Act, 42 U.S.C. §1983, by plaintiff for his discharge by defendants, acting as agents of Northern Illinois University, a state college, and also for the accompanying action removing him from all teaching duties in the classroom in mid-semester. The jury rendered a verdict in favor of defendants, upon which verdict judgment was entered. The judgment was affirmed by the Court of Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported, and is reproduced as Appendix "A" to this Petition. The District Court rendered no opinion.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a public school teacher's rights under the First Amendment were abridged where he was denied reappointment, and removed from the classroom for the reason that he allegedly:

A. counselled an excessive number of students;
B. overemphasized sex in his health survey course;
C. counselled students with his office door closed;
D. criticized other staff members in the presence of students.

2. Whether the removal of a non-tenured teacher from the classroom in the midst of a school year is such a drastic action as to seriously damage him in his standing and association, and to impose such a stigma and disability upon him professionally so as to entitle him to a hearing.

STATEMENT OF THE CASE.

Plaintiff, L. Verdelle Clark, has a master's degree in education and a post-master's certificate and doctorate in education and has been a college professor for a period of twenty years. In August of 1962, plaintiff was hired by Northern Illinois University (hereinafter sometimes referred to as Northern) as an Associate Professor of Biology for the 1962-63 school year. In order to take this position, he gave up other opportunities. His contract was subsequently renewed for the 1963-64 school year. On December 11, 1963, Dr. Clark was notified in writing that his contract to teach at Northern Illinois University, which expired June 8, 1964, would not be renewed. This notice gave no reason for the termination. Within two months he was suddenly relieved of all teaching duties in mid-year.

On or about April 30, 1963, plaintiff had been informed, in writing, that he would be rehired for the

school year 1963-64. This notification, written by Dr. Terwilliger, Chairman of the Department of Biological Sciences, as well as informing plaintiff that he would be rehired for the coming year, stated:

> "1. Forget the role of counsellor to every student. True, students need advice. We have counselling service where students can be directed and it need not be the task of the individual teacher to solve all student problems. No single teacher could have '150 hours' of student conferences unless said students were given a strong invitation to 'confess'.
>
> "2. Reduce the emphasis on sex in Biology 104. It's important but not the major theme of the course.
>
> "3. If possible, confer with students with an 'open door' policy. It has been a custom of long standing to talk to our students with open office doors. Unfortunately, some students might make embarrassing accusations which have ruined more than one teacher in spite of his innocence.
>
> "4. Refrain from belittling staff, both in our own and other departments. It is hoped that much of what filters back to us is distorted, but if complaints are necessary, they should be presented to the proper people and *not discussed with students.*"

After receiving this letter from Dr. Terwilliger, plaintiff spoke to him, stating that he resented the fact that Dr. Terwilliger was criticizing his classes without ever having visited them. During this same conversation, plaintiff informed Dr. Terwilliger that if a student came to him with a request for help, he did not intend to turn that student away. He also informed Dr. Terwilliger that he felt that such criticism without knowledge of the

facts was inappropriate. He also informed Dr. Terwilliger that his emphasis on sex education in his health class, consisted of sex education as related to family living, i.e., how to answer questions about sex from younger children, and did not include birth control or sexual techniques, and that this content was the result of requests from students in a survey which he had made of his classes. During this conversation, Dr. Terwilliger told plaintiff that he had received some reports that some of the material in Dr. Clark's classes was not proper, but when requested by Dr. Clark to identify this material, he replied that he did not know what it was.

During the same conversation, in regard to the comment that he had criticized other staff members, Dr. Clark pointed out that this was something all the faculty did constantly. Plaintiff also told Dr. Terwilliger during this conversation that the reason he closed his door during conferences with students on many occasions was that the students had requested that he talk to them in private and that he felt that the students were entitled to such privacy.

On or about December 11, 1963, plaintiff received a letter from Dr. Terwilliger, informing him that his contract to teach at Northern would not be renewed. After receiving this letter, plaintiff had the beginnings of a conference with Dr. Geigle, the Vice President of the University. This conference was interrupted and there was no discussion of the alleged reasons for his termination.

At no time prior to the action taken against him was plaintiff given a clear set of reasons as to why his con-

tract was not being renewed, nor was he given a meaningful or fair hearing on any charge, although he requested such a hearing on numerous occasions. On February 3, 1964, plaintiff was called to a conference with Drs. Terwilliger, Rohde, and Feyerherm. At this meeting, Dr. Terwilliger told plaintiff for the first time, and without prior notice or warning, that he had been directed by Dr. Geigle, the Vice President, to inform plaintiff that he would not be allowed to teach classes for the second semester of the 1963-64 school year, despite prior notifications that he would teach during that semester. When plaintiff asking whether there were any charges against him, Dr. Terwilliger initially replied: "No charges. We just decided we are not going to have you teach." He was later informed during this conversation that the reasons were that he was involved in too much sex education in his classes and had criticized his fellow professors. At this time, plaintiff said that he did not believe he was being accorded due process and that he desired specific charges and a hearing before the Board of Higher Education. During this conversation, Drs. Terwilliger, Feyerherm and Rohde all informed plaintiff that if he would accept their judgment without causing trouble and not do anything for the rest of the semester, he would be given good references, but that if he expressed any resentment, he would not be given any reference.

Subsequent to this meeting, plaintiff attempted to obtain an interview with Dr. Holmes, the President of the University, and with Dr. Geigie, the Vice President, but was denied an opportunity to meet with them.

Subsequent to the conference involving Drs. Clark, Terwilliger, Rohde and Feyerherm, a letter was written from

Drs. Terwilliger, Feyerherm and Rohde, purportedly setting forth some of the events of that meeting, as follows:

"Dear Sirs:

"In accordance with your directions of last weekend, Dr. Clark was notified that he would not be scheduled for any classes for the spring semester. This conference was held Monday morning, February 3, at 10:00 a.m. At your suggestion, Doctors Feyerherm and Rohde were present.

"We would like to report amiable agreements and understandings were reached, but such was not the case. Dr. Clark challenged the validity of practically every accusation which I relayed to him. He continues to insist the University hired him with intent that this would work into a permanent position, if not with Biology, then with Physical Education. He bitterly resents unqualified outsiders passing judgment on the quality of his courses. He believes he has evidence that the overwhelming majority of students are behind him. He says that the instructor in charge of Kinesiology feels that his (Dr. Clark's) students are better prepared for kinesiology than any the instructor has seen. He says that what he is doing in his health course is what health educators insist must be done. He denies that he 'invites' students to come to his office to discuss medical, mental or other problems. They 'confide' in him by their own choice. Further, these students coming to him have no faith in the medical services and are suspicious of the Deans.

"Above all, he believes that the Administration should have called him in to discuss this rather than

doing this via the department. He believes the Administration should have confronted him with the evidence and the accusers. He believes he has been treated most unfairly. He is not complimentary to the Biology staff and feels, with rare exception, they have undermined his efforts. He feels the department is so grant-minded and research-oriented it deliberately neglects students. He believes that the temporary staff members are considered lackeys by the others and they have no voice in department affairs. He accuses the head of judging him unfairly and that he (the head) had no right to send a copy of a letter to the Dean in which criticism of his (Dr. Clark's) actions were stated.

"It is probably appropriate at this time to mention that many of the accusations made by Dr. Clark were not repeated at the time, because of the difficulty of interrupting Dr. Clark's lengthy explanations. Probably little understanding would have been gained. However some points were brought up by the members present (Rohde, Feyerherm, Terwilliger) are as follows:

"1) The position was offered as a temporary one to fill the vacancy left by Mr. Janeway, who took leave of absence. There was no promise that this would be permanent. Dr. Clark was offered a second year when it became apparent staff would be needed the following (this) year.

"2) The stories coming back indicate that Dr. Clark had been picking up and perhaps emphasizing many topics considered by most people to be inappropriate. We surmise that Dr. Clark has been rela-

tively free with the criticism of the way in which the institution is run—we do not believe discussion of matters such as this are appropriate. We do not believe this is an infringement of academic freedom.

"3) Sex education seemed to be the overwhelming issue in his classes. This is a deduction which one could make examining his tests. This is vehemently denied by Dr. Clark. He states that students desired even more time on this subject.

"4) The volume of students in and out of his office suggests he has taken over the function of counselling offices, medical services, etc. (he does not consider this unusual—in fact, he feels an important task he has is to refer these students to experts. He credits his counsel with preventing a couple of suicides, saving numbers of lives by referring these students to proper medical authorities, etc.)

"It is difficult to assess this meeting. We regret that it had to occur. Most of the time Dr. Clark did the speaking. He says he has followed his convictions and there is no regret for the manner in which he has conducted his courses. He seems to have little intention of letting the matter rest. He has been through a series of physical ailments himself in the past year and one-half. In addition, his family has had a number of crises. What this may have contributed to his vilification of Northern we make no guess.

"The meeting subsided and adjourned at about noon."

All defendants testified at the trial. They all stated that they had no personal knowledge to support these

charges against plaintiff, except for perhaps one or two minor matters. None of them could give the names of any persons who did have first-hand information of any of the charges.

The decision to relieve plaintiff of his teaching responsibilities was made jointly by Drs. Geigle, Skok and Terwilliger. No conversations were had with plaintiff prior to the time this decision was made. None of the persons making this decision had any personal knowledge regarding the matters.

The University Board was never informed that plaintiff had been relieved of his teaching duties for the Spring semester of 1964. Dr. Geigle testified that it is drastic and unusual to relieve a teacher of classes at the beginning of the new semester. He knew of nothing which had occurred between December 11, 1963, when plaintiff was informed that he would not be rehired at Northern, and February 3, 1964, when he was told that he would be relieved of his teaching duties for the second semester. The only information which he had regarding the reasons for terminating plaintiff and for relieving him of his responsibilities for teaching classes was what had been told him by his subordinates.

The trial court refused to instruct the jury in accordance with the following instructions tendered by plaintiff:

> "The fact that the defendant had no specific intent or purpose to deprive plaintiff of his civil rights will not absolve him from liability if he did in fact deprive him of those rights."
>
> "The employment of a teacher in a state school cannot be terminated because he has exercised those

freedoms secured to him by the Constitution of the United States, regardless of whether he has tenure under State law."

"Due process of law in connection with the termination of the employment of a teacher at a State school requires that he be served with a statement of the reasons why he is not to be retained, notice of a hearing at which he may respond to these reasons and a hearing at which he has a reasonable opportunity to submit evidence relevant to these reasons."

"A teacher at a State school may not be dismissed from public employment for exercise of his First Amendment rights of freedom of speech unless he made statements knowing them to be false, or with reckless disregard as to whether they were false or not."

The trial court instructed the jury, in part, as follows, over the objections of plaintiff:

"What I have just said to you is in order to find any particular defendant liable, you must find with respect to that defendant that Dr. Clark has proved by a preponderance of the evidence each of the following matters:

"1. That in connection with the plaintiff's not being given a new contract, he was entitled, as a right under the Constitution, to more opportunity to give his side than, in fact, he was afforded. That is, that he was not given an opportunity to learn what the charges were, or an opportunity to refute them, which was reasonable under all of the circumstances.

"Let me say in this connection that the law does not require that a non-tenured, temporary teacher be given a formal list of charges, and have a formal hearing at which he can cross examine persons who accuse him, and so forth.

"On the other hand, it does require that he be given a reasonable opportunity, 1) to know what it is that he is charged with, or the complaints against him, and 2) a reasonable opportunity to respond without the formality of a formal charge and formal hearing; and the requirement in this case is that he have been given a reasonable opportunity.

"What he has got to show then, first, he wasn't given such a reasonable opportunity, that he was not given either a reasonable statement of the complaint against him, charges against him, or reasonable opportunity to answer or respond or rebut them.

"Second, he must show that the particular defendant was personally involved—first, if you find he had a reasonable opportunity, you don't come to the second one because at that stage of the game, the issue is foreclosed, but if you come to the second one, you will have to find that the particular defendant personally was involved in the denial to Dr. Clark of the opportunity to have a fair and reasonable hearing.

"And finally, the fifth thing, is that you must find that the action took place after November 23, 1963. The reason for that is that there is a five-year statute of limitation which is applicable to suits under section 1983."

The jury returned a verdict in favor of all defendants, and against plaintiff.

The Seventh Circuit Court of Appeals affirmed, in a seven page *per curiam* decision. The Court held that any dispute between plaintiff and his superiors concerning course content were not "matters of public concern", that the plaintiff had no right to override the wishes and judgment of his superiors as to the proper content of the required health course, and the inadvisability of engaging in extensive personal counselling of students, and that plaintiff had no right to criticize the school's administration and faculty in front of students. In short, the Court of Appeals held that plaintiff had absolutely no First Amendment rights in this matter:

> "Thus, the trial court wisely rejected Clark's contention that all of his actions of which the defendants complained were protected by the First Amendment. Instructions on the First Amendment rights of teachers were inapplicable to this case. . . . There was no First Amendment issue appropriate for consideration by the jury."

The Court of Appeals also held that plaintiff did not fall within the categories set forth by this Court in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), wherein it was required that a hearing be given a teacher against whom charges have been made which might seriously damage his standing and associations, or upon whom has been imposed a stigma or disability that forecloses his freedom to take advantage of other employment opportunities.

REASONS FOR GRANTING THE WRIT.

I.

PLAINTIFF WAS PENALIZED FOR EXERCISING HIS FIRST AMENDMENT RIGHTS.

Plaintiff was a non-tenured teacher at Northern Illinois University. At the time of the acts complained of, he was in his second year, working on a one-year contract. On or about December 11, 1963, he was informed by letter that his contract would not be renewed after its expiration at the end of the school year. No reasons were given to him at this time for the decision not to rehire him for the coming year, nor was he afforded any fair hearing. Within a very short period of time, on or about February 3, 1964, immediately prior to the commencement of the second semester, plaintiff was suddenly called to the office of the head of the department, Dr. Terwilliger, who was at that time accompanied by Drs. Rohde and Feyerherm, members of the Biology Department Staff. During this conference, he was suddenly informed that he was being relieved of all further teaching responsibilities immediately. It is undisputed that the reasons given for this drastic and unusual action were that plaintiff had criticized other members of the Biology Department and the manner in which Northern was being run; he was emphasizing sex education to too great an extent in his health course; and was spending too much time counselling with too many students. Plaintiff states that during this conference he was informed that these were also the reasons why his contract at Northern

was not being renewed. Defendants denied the charges. It is a fact that on April 30, 1963, when plaintiff was informed that he would be rehired for the 1963-64 school year, the same points were brought to his attention in writing and resolved.

The testimony at the trial, particularly that of defendants, shows that the officials at Northern evidenced a complete disregard of the constitutional rights of plaintiff or ordinary fairness. It is clear that every one of the purported reasons given by them for the decision not to rehire plaintiff was in fact a retaliation against him for his exercise of his First Amendment rights. They were not willing to accord to him the academic freedom they accorded to themselves, and they were not ready to accord him the rights guaranteed to all citizens to speak on so all-important a matter as the manner in which our public institutions are run. It has long been recognized that actions such as those of the defendants cannot be countenanced in our society which thrives on an unrestricted marketplace of ideas. The action by defendants here strikes at the very heart of academic freedom. As was said by this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 683 (1967):

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us and not merely to the teachers concerned. The freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker,* 364 U.S. at 487, 81 S. Ct. at 251. The classroom is peculiarly the 'marketplace

> of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States* v. *Associate Press, D.C.*, 52 F. Supp. 362, 372."

Purportedly relying upon *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the Court of Appeals held that plaintiff had *no* first amendment rights of any kind in this situation. Such a holding flies directly in the face of what this Court said in that case:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."

The Court of Appeals reached this conclusion on the basis that plaintiff had not spoken out in the community at large, but within the confines of the University itself. The Court seems to be saying that matters of public interest and importance may be discussed outside of the University, but not within it. Such a holding would indeed emasculate the very right of academic freedom which this Court has so often reaffirmed. Where better to discuss matters dealing specifically with the University, its workings, and shortcomings, but within that milieu itself? Must a professor exercise his right to freedom of speech everywhere but where it will do the most good? Are not students at a university—students of the age at which they are allowed to vote, exercise all of the other rights and duties of citizenship—indeed, of the age at which

they are called upon to die for their country—to hear matters which others may hear? Are their ears too tender to hear criticism of the very institution which is supposedly designed to teach them to inquire and to think for themselves? Are they limited to voicing such criticism among themselves and hearing such criticism from their peers? May they not hear directly from a professor's mouth the kind of criticism of their university which he may freely print in a newspaper?

What is of greater interest and importance to the faculty and student body of a university than the shortcomings of the very institution which most concerns their daily lives? Are other professors and administrators immune to criticism from within the university itself? The answer must be a resounding no!

An apt and well documented statement of the rights of college professors is found in *Pred* v. *Board of Public Instruction of Dade County,* 415 F. 2d 851, 855-56 (5th Cir. 1969):

> "The protections of the First Amendment have been given special meaning when teachers have been involved. Simply because teachers are on the public payroll does not make them second-class citizens in regard to their constitutional rights. See *Spevac* v. *Klein,* 1967, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574; *Garrity* v. *New Jersey,* 1967, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562. 'Our Nation is deeply committed to safeguarding academic freedom . . . .' *Keyishian* v. *Board of Regents,* 1967, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629, 640. 'To impose any straight-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.' Id. at 603, 87 S. Ct. at 684, 17 L. Ed. 2d at 641."

It is apparent that the reasons given by defendants for their dismissal of plaintiff were clearly improper and impermissible, as all of the actions by plaintiff of which they complained were protected by the First Amendment to the United States Constitution.

The trial court refused to charge the jury in accordance with the following instructions tendered by plaintiff which refusal was endorsed by the Court of Appeals:

> "The employment of a teacher in a state school cannot be terminated because he has exercised those freedoms secured to him by the Constitution of the United States, regardless of whether he has tenure under state law." (R. 716)
>
> "A teacher at a state school may not be dismissed from public employment for exercise of his First Amendment rights of freedom of speech unless he made statements knowing them to be false, or with reckless disregard as to whether they were false or not." (R. 718)

Both the District Court and the Court of Appeals held that plaintiff had no First Amendment rights. These holdings fly directly in the face of this Court's holding in *Perry* v. *Sinderman*, 408 U.S. 593, 92 S. Ct. 2694 (1972):

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

The Court of Appeals relied upon *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733 (1969) in holding that "First Amendment rights must be applied in light of the special characteristics of the environment of the particular case." Such a holding is a gross perversion of this Court's opinion in that case, where it was said:

> "But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131, (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

See also *Pickings* v. *Bruce*, 430 F. 2d 595, 598 (8th Cir. 1970).

Here, the defendants made no attempt to show that there was in fact any substantial disruption of any kind. Since defendants, by their own testimony, relied upon speech on the part of plaintiff as their reason for determining not to retain him for the coming school year, it was incumbent upon them to show that the speech of which they complained had a disruptive or evil effect. Yet, the defendants, almost to a man, testified that they had no personal knowledge, nor had they spoken to anyone personally, who had any such personal knowledge that the statements by plaintiff had had any such effect.

None of the defendants had any personal knowledge upon which to base their decision. None of them had seen plaintiff conduct any of his classes; none of them had listened in on any of his counselling sessions; and none of them had heard him criticize any member of the faculty or administration. None of them had spoken to him directly about any of these alleged matters, except for Drs. Terwilliger, Rohde and Feyerherm during the one meeting on February 3, 1964, where, by their own admission, plaintiff had denied these charges. None of them had spoken to any students. None of them could give one concrete example, or the name of one person who had made any of the charges.

Their decision to dismiss plaintiff was based upon the basest conjecture, rumor and hearsay. Their attempts to justify this decision were weak and without foundation. It is apparent that they were determined to penalize anyone who did not fit into their mold, and slavishly conform to their wishes and desires.

They alleged that plaintiff had emphasized sex education in his health education course to too great a degree.

Yet, they could not state that the content of his courses was in any way improper or incorrect. In this day when college professors are given the right to teach unorthodox and even obscene material in certain circumstances, this reason smacks of censorship of the worst sort; censorship of something unknown to them. Apparently these old men were of the opinion that "sex" was a dirty word. Yet, today, it is important that college students receive as much objective information on this subject as possible, in the best interests of society.

The allegation that plaintiff was engaging in too much counselling with students is similarly baseless. None of the defendants were able to point to anything improper in plaintiff's counselling with students. No student or parent complained. Again, petty jealousies regarding plaintiff's popularity with the students gave rise to penalizing plaintiff for exercising his constitutional rights.

Finally, defendants contended that plaintiff was guilty of criticizing the administration and faculty. Nowhere was there any hint of the type of criticism, except some comments that plaintiff had stated that he was one of the few professors who had any interest in the students.

It is obvious that all of these statements and actions on plaintiff's part were protected expression. He had a right to have the jury so informed. At the very least, the plaintiff was entitled to an instruction to the jury which would have defined his rights in this regard. However, the District Court made it clear that he felt that plaintiff, since he was an untenured teacher, had no right to any expectation of future employment, and that the contention was irrelevant to the cause of action. This attitude was affirmed by the Court of Appeals. This is abso-

lutely not the law. The drastic and unusual decision to relieve plaintiff of his classroom position for these very same reasons along with the decision not to retain him on the faculty in the future were such as inevitably to have an effect upon his ability to obtain employment in the future. This was obviously a penalty visited upon him as a result of his exercise of his rights to freedom of speech, for which he was entitled to redress. The refusal to so hold was clearly error.

II.

PLAINTIFF WAS DENIED THE HEARING TO WHICH HE WAS ENTITLED.

The Court of Appeals, as well as the District Court completely misconstrued plaintiff's argument concerning his rights to a due process. The Court of Appeals held that plaintiff "was not deprived of his Fourteenth Amendment rights of 'liberty' or 'property' by a state university's failure to give him a statement of reasons for the nonrenewal of his contract and to grant him a hearing at which to challenge those reasons." Plaintiff's contention was not that he had been given no reasons for the failure to renew his contract, but that the reasons given for his extraordinary removal from class, which were the same reasons given for his nonretention were not only protected under the First Amendment, but were so damaging as to necessarily harm him in the future by hindering his ability to obtain other employment.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), this Court stated:

> "The State, in declining to rehire respondent, did not make any charge against him that might seri-

ously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' . . . In such a case, due process would accord an opportunity to refute the charge before University officials."

Here, such charges were in fact made against plaintiff. And, he was not only not rehired, but was summarily removed from the classroom in mid-year after having been hired for the full year. This was an unusual and drastic action. Taken together with his nonrenewal, this removal from the classroom was highly damaging to plaintiff's reputation as a teacher. Indeed, one or more of defendants went so far as to accuse plaintiff of being dangerous in the classroom. It is difficult to imagine a more damaging charge.

What is more, both the District Court and the Court of Appeals completely ignored the fact that in a situation such as this, the hearing to which plaintiff was entitled was to be held *before* any action was taken against him. Thus, this Court said in *Roth*:

"Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113. 'While "[m]any controversies have raged about . . . the Due Process

> Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90." (footnote 7)

Here it is clear that plaintiff was not given even a pretense of a hearing until after the decision was made to remove him from the classroom. Then, the only "hearing" which he was accorded was a conference before a group of three of his accusers who had made up their minds without hearing from Dr. Clark. This is not a hearing in any sense of the term. It is a kangaroo court in the worst sense.

Nor was the jury given any reasonable guidelines by the District Court in regard to plaintiff's rights, a situation which alone required reversal of the decision of the District Court.

Plaintiff specifically requested the trial court to instruct the jury as follows:

> "Due process of law in connection with termination of the employment of a teacher at a state school requires that he be served with a statement of the reasons why he is not to be retained, notice of a hearing at which he may respond to these reasons and a hearing at which he has a reasonable opportunity to submit evidence relevant to these reasons."

Rather than instructing the jury in such a straightforward and unambiguous manner, the trial court instructed them rather muddily as follows:

"Let me say in this connection that the law does not require that a non-tenured, temporary teacher be given a formal list of charges, and have a formal hearing at which he can cross examine persons who accuse him, and so forth.

"On the other hand, it does require that he be given a reasonable opportunity, 1) to know what it is that he is charged with, or the complaints against him, and 2) a reasonable opportunity to respond without the formality of a formal charge and formal hearing; and the requirement in this case is that he have been given a reasonable opportunity.

"What he has got to show then, first, he wasn't given such a reasonable opportunity, that he was not given either a reasonable statement of the complaint against him, charges against him, or reasonable opportunity to answer or respond or rebut them."

It is clear that this is far short of the hearing which is required by the Constitution. A hearing, if it is to have any meaning at all, must be a hearing before the decision has been made. To grant a "hearing" after a decision has been made is to satisfy (if at all) the form of due process without regard to its substance. Once a decision has been made, it will be changed only in the most unusual of circumstances. This does not comport with the high purposes and strict requirements of the First and Fourteenth Amendments.

It is clear that the reasons for the intended dismissal must be set out in a reasonable manner and given to the individual involved a reasonable time before the contemplated hearing. To confront plaintiff with the reasons for the drastic action to be taken against him and re-

quire him to respond immediately, as was done in this case, is certainly insufficient. This is one of the vices of the instruction given to the jury in this case, which instruction assumed that he had an opportunity to respond and placed the burden upon him to show that he was entitled to more opportunity than he was in fact afforded.

Indeed, this instruction did not give the jury any guidelines whatsoever as to what is proper due process, for by its very terms it allowed the jury to determine whether plaintiff had a reasonable opportunity to respond to it. Due process is a constitutional issue to be defined by the court, not left to the unfettered discretion of the uninformed jury.

Neither the Court of Appeals nor the District Court complied with the requirements which this Court has set down regarding due process.

CONCLUSION.

Plaintiff was clearly and obviously penalized by defendants, and Northern Illinois University, for exercising his rights guaranteed under the First Amendment. The decision not to renew his teaching contract at Northern was based solely upon his exercise of those rights. Even more, he was relieved from all teaching responsibilities, suddenly, arbitrarily, and without warning, for the same reasons. He had rights under the First Amendment, which rights were completely ignored by both the District Court and the Court of Appeals.

At no time was plaintiff given any advance, coherent statement of the underlying reasons for his discharge, although he was accused of many vague improprieties by defendants. He was given no hearing at which he could respond to these unsupported allegations in any meaningful fashion. The trial court did not adequately instruct the jury on these matters, although requested to do so by plaintiff, but, rather, allowed the jury to determine whether plaintiff had been treated with some undefined "fairness." This was clearly improper.

This case shows a flagrantly arbitrary and improper action against a college professor. It is shocking to contemplate that such actions could occur in a public, tax-supported institution of higher learning, which is supposed to foster our Constitutional rights, rather than to suppress them in the supposed interests of a closed circle of academic seniors, unduly sensitive to their own assumed authority and dignity, but callous to the rights of others.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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APPENDIX "A"

Opinion of the United States Court of Appeals for the Seventh Circuit, December 12, 1972

Before SWYGERT, *Chief Judge*, PELL and STEVENS, *Circuit Judges*.

PER CURIAM. In his amended three-count complaint based upon 42 U.S.C. §§ 1983 and 1985(3), L. Verdelle Clark sought damages for the alleged violation of his civil rights by certain teachers and officials at Northern Illinois University (NIU),[1] a state institution of higher learning. A nontenured temporary substitute teacher at NIU from 1962 to 1964, Clark claimed, *inter alia*, that the defendants had made false charges against him, the result of which was that NIU decided not to rehire him. The defendants also allegedly denied him a hearing or investigation of these charges. Clark maintained that these actions stemmed from a conspiracy among the defendants, who allegedly wished to penalize him for exercises by him of his right to freedom of speech.

The trial, limited to the question of liability, was held before a jury. At the close of the plaintiff's case, the court granted a directed verdict for the defendants on the

[1] The amended complaint named as defendants fourteen professors and administrators and ten former members of the Teachers College Board, which at the time the cause arose was the state board governing NIU. On defendants' motions, the ten Board members and all but six of the professors and administrators were dismissed from the case.

issue of conspiracy (Count II and part of Count I).[2] It also rejected plaintiff's proffered instructions on the First Amendment rights of public school teachers. The jury returned verdicts for each of the defendants. After the court denied his motion for judgment notwithstanding the verdicts or for a new trial, Clark brought this appeal.

In August 1962, Clark applied for and accepted a temporary position for the fall semester of 1962 as an associate professor in NIU's Department of Biological Sciences. Clark was to substitute for the professor who usually taught a required introductory health survey course. The possibility of employment for the spring semester was left open. When the teacher for whom the plaintiff was substituting decided not to return for the spring session, Clark accepted an offer to teach that semester.

In a letter dated April 30, 1963, the head of the Department of Biological Sciences offered Clark a temporary position for the following academic year, 1963-1964, as a replacement for another professor. The letter also warned Clark that his acceptance of the offer should be made with the understanding that he should remedy certain deficiencies in his professional conduct: he counselled an excessive number of students instead of referring them to NIU's professional counsellors; he overemphasized sex in his health survey course; he counselled students with

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[2] Prior to trial, on August 24, 1970, the district court granted summary judgment for the defendants named in Count III, which charged that Clark had been blacklisted so as to prevent him from securing future employment at other universities.

his office door closed; and he belittled other staff members in discussions with students.

Clark subsequently discussed these criticisms with the department head and with defendant Skok, then Dean of the College of Liberal Arts and Sciences. He defended his conduct, maintaining that it was proper for a teacher to hold himself out as a personal confident of his students and denying that he was teaching too much sex education. He stated that he had surveyed his students' interests, had found that they wanted sex education and mental health emphasized and so had agreed to do so and only "touch on" the other topics covered by the assigned text and the course syllabus. Rejecting disapproval of his critical remarks as hypocritical, he declared that he would not stop discussing with students his complaints about the administration and other teachers and he would not confine his discussions to his office. Rather, he would "do it where I think it is effective, and if it costs me, so be it."

In May 1963, Clark formally accepted the temporary position for the 1963-64 academic year. On December 11, 1963, he received written notification that his temporary contract terminated June 8, 1964. In early February 1964, at a conference with the department head and two senior members of the department, Clark was told that he would not be scheduled for any classes for the spring semester, 1963-64. The three men pointed out to Clark that his position was a temporary one and repeated most of the criticisms outlined in the April 30th letter.

(Opinion of the U. S. Court of Appeals)

Although plaintiff's briefs and oral argument leave us somewhat uncertain as to his contentions on this appeal, it appears that he claims the trial court erred (1) in refusing to instruct the jury respecting First Amendment rights of public school teachers; (2) in excluding testimony of a faculty member about his efforts to secure Clark a hearing; (3) in instructing the jury that Clark's due process rights in connection with the expiration of his contract did not include the right to formal charges and hearing; and (4) in directing a verdict for the defendants on the conspiracy issue.

After lengthy discussion with counsel, the trial court declined to instruct the jury to the effect that a public school teacher has a First Amendment right to teach and say anything he wishes in classes and to students as long as he does not make statements knowing them to be false or with reckless disregard of their truth or falsity.

Both parties claim to find support in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), a major pronouncement of the First Amendment rights of public school teachers. There, the Supreme Court reversed the dismissal of a teacher who had written a letter to a local newspaper in which he, as a citizen, criticized the Board of Education's allocation of school funds and its method of informing the district's taxpayers about the need for additional tax revenue. The Court analyzed the First Amendment problem as follows:

> "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it pos-

sesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance* between the interests of *the teacher, as a citizen,* in commenting upon matters of *public concern,* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. [Emphasis added.]

Cf. Mailloux v. *Kiley,* 448 F.2d 1242, 1243 (1st Cir. 1971).

Clark's claim of error fails for two reasons. First, Clark construes too broadly the extent of his First Amendment rights and thus slights the interest of the State in providing its educational services according to policies it deems proper. Clark would have us drastically and radically curtail the scope of discretion which may be exercised by a state school in deciding whom it shall rehire. Second, Clark ignores the factual differences between his case and a case like *Pickering.* His disputes with his superiors and colleagues about course content and counselling were not "matters of public concern" and involved Clark as a teacher rather than as an interested citizen. *Compare also Perry* v. *Sindermann,* 408 U.S. 593, 595, 598 (1972); *Donahue* v. *Staunton,* No. 71-1160 (7th Cir., July 6, 1972). Further, Clark has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to the proper content of the required health course and the inadvisability of engaging in extensive personal counselling of students, two of the three matters about which most of the defendants were particularly concerned.

The same reasoning applies to Clark's criticisms of NIU's administration and faculty in front of students. We think the district court correctly decided that this conduct also was not protected by the First Amendment. *Pickering,* which guards a public school teacher's right to speak out publicly on issues of public concern, is factually distinguishable from the present case. However, we do recognize that, although academic freedom is not one of the enumerated rights of the First Amendment, *Parducci* v. *Rutland,* 316 F. Supp. 353, 355 (M.D. Ala. 1970), it is now clear that academic freedom, the preservation of the classroom as a "market place of ideas," is one of the safeguarded rights. *Healy* v. *James,* 408 U.S. 169, 180-81 (1972). But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969); *Healy, supra.* The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations. *See Ferguson* v. *Thomas,* 430 F.2d 852, 858 (5th Cir. 1970).

Furthermore, *Pickering* suggests that certain legitimate interests of the State may limit a teacher's right to say what he pleases: for example, (1) the need to maintain discipline or harmony among co-workers; (2) the need

for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence. *Cf. Cook County Teachers Union, Loc. 1600* v. *Byrd*, 456 F.2d 882, 889-90 (7th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3179; *Albaum* v. *Carey*, 310 F. Supp. 594, 596 (E.D.N.Y. 1969).

Thus, the trial court wisely rejected Clark's contention that all of his actions of which the defendants complained were protected by the First Amendment. Instructions on the First Amendment rights of public school teachers were inapplicable to this case. Further, the theory of First Amendment rights urged upon the district court by plaintiff and as presented in his tendered instructions was overly broad. There was no First Amendment issue appropriate for consideration by the jury.

In regard to Clark's due process contention, we think that two recent Supreme Court decisions resolve that issue against the plaintiff. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), held that a non-tenured teacher employed under a one-year contract offering no promise of renewal was not deprived of his Fourteenth Amendment rights of "liberty" or "property" by a state university's failure to give him a statement of reasons for the nonrenewal of his contract and to grant him a hearing at which to challenge those reasons. The Court did note two possible exceptions to the rule it was

enunciating;[3] however, those exceptional circumstances are not present in Clark's case. In a companion case to *Roth, Perry* v. *Sindermann, supra,* the Court held that a state college teacher, employed under a series of one-year contracts, who alleged that the college had a de facto tenure policy, was entitled to an opportunity to prove the validity of his claim to job tenure and, upon proof, to a hearing on the grounds for his nonretention. Plaintiff Clark, a temporary substitute teacher, clearly was not in an analogous position.[4]

Clark's final complaint is that the district court erred in directing a verdict for the defendants on the issue of conspiracy at the close of his case. The court did not err, for, quite simply, the plaintiff failed to make out a prima

[3] The two special situations were:

(1) The State, in declining to rehire a person, makes a charge against him that might seriously damage his standing and associations in his community. Such a charge might be, for example, that the employee had been guilty of dishonesty or of immorality. The purpose of notice and hearing then would be to provide the person with an opportunity to clear his name.

(2) The State, in declining to re-employ a person, imposes on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities. The Court gave the example of where the State bars the person from all other public employment in State universities. It further explained that "[m]ere proof . . . that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'"

[4] *Perry* also held that lack of contractual or tenure right to re-employment, taken alone, does not defeat an ex-employee's claim in *federal district court* that the nonrenewal of his contract was based on his exercise of his constitutional rights and was, therefore, violative of his First and Fourteenth Amendment rights. In so deciding, the Court did not make "new" law; previous cases had made this

facie case. He did not substantiate his charge that the defendants held many clandestine conferences about him or that the actions the defendants did take revealed any illegal purpose.

Although Clark disclaims that he was raising an issue on appeal of the sufficiency of the evidence to support the jury verdict, a substantial portion of the argument addressed to us seems to be the sort that would have been appropriate if we were concerned with a de novo factual determination, which, of course, we are not. Further, it must be noted that at the time of the filing of briefs in this appeal the law of the circuit, upon which plaintiff in part relied, was found in *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W.D.Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971). The reversal of *Roth* (408 U.S. 564) occurred subsequent to briefing but prior to oral argument.

In light of the above, we conclude that no reversible error occurred and the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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point clear. Nevertheless, plaintiff Clark mistakenly interprets this holding of *Perry* to mean that if a teacher claims he was not rehired for constitutionally invalid reasons, he must be given a hearing *by the state school.*

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

vs.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE AND ROBERT BULLINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS.

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April 6, 1973.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS.

QUESTIONS PRESENTED.

1. Whether a temporary, nontenured public school teacher is protected by the First Amendment against nonrenewal of his contract because of disapproval by his departmental and administrative superiors of the emphasis and conduct of his classes, his actions in giving personal counselling to students, and his belittling of other staff members in discussion with students.

2. Whether the decision not to rehire such a teacher, for the aforementioned reasons, imposes upon him a stigma or dis-

ability foreclosing other employment or seriously damaging his standing or associations in his community, so as to require under the Fourteenth Amendment that he be accorded a formal notice and hearing with respect thereto.

STATEMENT OF THE CASE.

Petitioner was employed by Northern Illinois University ("Northern") during two academic years, 1962-63 and 1963-64, as a temporary teacher substituting for two faculty members who were on leaves of absence. [A. 25-39.]* He did not have tenure nor, as a temporary substitute, was he eligible for consideration for tenure. Petitioner's contract expired at the end of the 1963-1964 school year, official notice of such expiration having been given six months prior thereto. [A. 41.]

During the course of his employment at Northern, several undesirable aspects of petitioner's teaching and conduct with students came to the attention of his colleagues and superiors in the Department of Biological Sciences. Three matters in particular were stressed by petitioner at the trial below:

1. Petitioner's emphasis on sex and mental health and corresponding neglect of other topics on the Department syllabus in the survey course petitioner taught in the field of health, a course required for all students.

2. Petitioner's practice of encouraging students to come to him for personal counselling; the unusually large number of students who responded and the fact that petitioner often raised the grades of those who came to see him, by this device encouraging them to do so; and the fact that he discouraged students from using Northern's professional counselling and health services.

* Page references prefixed with "A" refer to the Appendix, and those prefixed with "Supp. A." refer to the Supplemental Appendix, for the Court of Appeals.

3. Petitioner's habit of belittling his colleagues personally and professionally in his classes and in his office while conferring with students.

Though he suggests in his Petition that the respondents had no evidence to support their conclusions, in fact the record at trial discloses numerous instances of their observing his teaching or counselling [A. 157-58, 160, 219, Supp. A. 13-22], of his showing them classroom materials and discussing with them what he was covering in class [A. 215, Supp. A. 28-29], and of other evidentiary bases for their opinions [Supp. A. 6, 31]. The Petition ignores such aspects of the general setting of the case as that one of the respondents shared an office for a year and a half with petitioner. [Supp. A. 27-28.] More importantly, it ignores the fact that the differences between petitioner and his colleagues were not over whether he did engage in the practices objected to, but over the propriety and desirability of such practices. There was ample evidence at trial from his own and others' testimony that he himself admitted and even boasted about his conduct. Petitioner testified, for example, that in response to the Department Chairman's complaint about his distortion of course emphasis, he told the Chairman he would "emphasize sex education and mental health" and only "touch on all the other subjects." [A. 77.] He testified that he "had large numbers of students come to me for counselling" [Supp. A. 4]; that he used a "shock technique" in teaching about such matters as childbirth and venereal disease [A. 80-81]; that his discussion of venereal diseases "stirred up apprehensions in the minds of most students" [Supp. A. 5]; and that he told the Department Chairman he would continue criticizing other staff, not to them personally or to the administration, but "where I think it is effective, and if it costs me, so be it." [A. 82.]

Petitioner was given written warning when hired for the second year that he was not to continue the objectionable practices [A. 35] and thereafter he had conferences on the subject with his Department Chairman and Dean in which he

defended his actions and declined to discontinue them. [A. 73-82.] The Chairman and the Dean, in consultation with the Provost, determined that in view of this refusal to comply, petitioner should not be scheduled for classes during the final semester before expiration of his contract. [A. 294-95.] This decision was announced to petitioner during the break between semesters and he again availed himself on a number of occasions of opportunities given to present oral and written justification for his conduct, to the Department Chairman and senior members of the Department [A. 256-58], the Dean [A. 295-304], the Provost [A. 181-82] and eventually the President of Northern [A. 282-90]. His salary, office space and other perquisites as a faculty member were continued until his contract expired.

It should be noted that, of the persons named as respondents in the Petition, only six are properly so named. Dr. George Terwilliger, the Chairman of the Department and the man who made the decision not to rehire petitioner, was never served and was dismissed as a defendant prior to trial. [A. x.] Dr. Robert G. Whitesel, an administrator involved in the hiring of petitioner, was also dismissed for nonservice prior to trial. [A. x.] Dr. Bruce Von Zellen, a member of the Department, was named in the Amended Complaint as having been involved in various conspiracies against petitioner, but was dismissed at the close of petitioner's case at trial for lack of evidence. [A. x.] No appeal was taken from any of these dismissals [A. 57] and these parties are not properly respondents in this matter.

The six proper respondents, and their positions at Northern when the cause of action arose, are Dr. Holmes, Northern's President; Dr. Geigle, the Provost; Dr. Skok, the Dean; and Drs. Bullington, Feyerherm and Rohde, the senior members of the Department of Biological Sciences.

ARGUMENT.

Respondents respectfully submit that a writ of certiorari should not be issued in this case. The decision below was clearly within the limits of the holdings as to teachers' rights by this Court in *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and other recent cases, and in applying such holdings does not conflict with decisions of other Circuits or State courts. Petitioner's argument depends generally upon allegations of fact that were contested or unsupported at trial and ignores the existence of a jury verdict which makes such statements unavailable for consideration on review in this Court. The parts of petitioner's argument concerning his being removed from teaching raise issues not presented or preserved below. The issue of whether petitioner had a right to a hearing under the Fourteenth Amendment is not squarely presented to the Court, since the jury in fact was instructed that petitioner had a right to a hearing.

I. The Case Presents No First Amendment Issue.

Petitioner claims that in not being rehired and in not being scheduled for classes during his last semester, he was penalized for exercise of his First Amendment rights. The only First Amendment instruction submitted by petitioner was one to the effect that a public school teacher has a First Amendment right to teach and say anything he wishes in classes and to students as long as he does not make statements knowing them to be false or with reckless disregard of their truth or falsity. [A. 48.] What this instruction really amounts to is a claim that the right to teach itself is a First Amendment right. Such a claim was rejected expressly in *Board of Regents* v. *Roth*, 408 U. S. 564, 575 n.14.

As the Court below noted [Petition, 5a], this instruction ignores the recognition given in cases like *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), to the interests of an educational institution in quality education and faculty harmony. *Pickering*, which involved a teacher's right to present in the public press his views on a school tax referendum, accorded First Amendment protection to speech on matters of "public concern" or interests of a teacher "as a citizen". 391 U. S. at 568. In contrast, petitioner's differences with his colleagues involved professional judgments on course contents and a teacher's role in counselling students. There is nothing in any of this Court's First Amendment holdings that permits a teacher to ignore the judgment of his superiors and fellow faculty members on purely intramural scholastic questions of this sort. Academic freedom is a two-way street in which professors and administrators like the respondents have First Amendment rights to make judgments on academic matters. The interests of the community and of education are best served by leaving professional judgments to professional discretion.

Petitioner's denigration of Northern's administration and faculty—even if dignified with the title of criticism—was not protected by the First Amendment either. Considerations of the time, place and nature of criticism are important to a determination of its First Amendment status. *Healy* v. *James*, 408 U. S. 169, 192-93 (1972); *Pickering* v. *Board of Education*, 391 U. S. 563, 569-70 (1968). Petitioner's remarks, as the Court below stated, were "irresponsibly made . . . to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations." [Petition, 6a.] It was not the kind of "public criticism of . . . superiors on matters of public concern" that this Court has said constitutes protected criticism. *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972). The respondents could not have entered petitioner's classes to debate him in defense of their views without obvious damage to the educational process and necessary institutional harmony. Petitioner's interest in free speech was therefore

clearly outweighed by that of the respondents in maintaining discipline and harmony among faculty and preventing disruption of classroom education. Accordingly, the Trial Court properly refused Petitioner's instruction and determined that there was no First Amendment question appropriate for consideration by the jury.

Petitioner raises the First Amendment issue in two contexts: that of the decision not to rehire him and that of the decision not to schedule him for classes during his final semester. The latter question is not properly before this Court. Removal from teaching was not an issue raised in petitioner's Amended Complaint [A. 1-10] nor was it among the issues stipulated for trial or raised in any proffered instruction. Accordingly, it may not be considered on certiorari. *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917).

II. The Case Presents No Due Process Issue.

The case was tried prior to the decisions of this Court as to the procedural rights of nontenured teachers in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 (1972). These cases held that, except in certain special situations, a nontenured teacher is not deprived of his Fourteenth Amendment rights to liberty or property by a university's failure to give him notice and a hearing in connection with a decision not to rehire him. The special exceptions to this rule which were referred to in *Roth* and are asserted by petitioner to apply in his case are (1) where a university made some charges against a teacher "that might seriously damage his standing and associations in his community," and (2) where a university, in declining to rehire a teacher, "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U. S. at 573.

Petitioner argues that he is within these exceptions because the disapproval of his teaching and counselling imposed a dis-

ability to future employment and damaged his standing a
teacher. This is an argument advanced for the first time
his Petition, and it is therefore not surprising that the recor
devoid of any actual attempt to show damage of this nat
or indeed of any evidence that the respondents or anyone
at Northern ever referred to their problems with petitioner
the community or elsewhere where he might have been harm
Petitioner must depend, then, simply on inference. But the
ferences of damage to be drawn from differences of opin
as to the desirability of an undisputed course of professio
conduct are very different from those to be drawn from
examples of damaging charges given by this Court in *Ro*
The opinion in *Roth* speaks of charges of "dishonesty" or "i
morality" which a hearing is necessary to give a teacher
opportunity to "refute". 408 U. S. at 573. It is thinking in ter
of charges concerning a person's character, and charges mo
over based on facts which may be proven false. In this c
the questions regarding petitioner's conduct were profession
not personal, questions of judgment, not truth. These
simply not the sort of matters that are amenable to soluti
through the processes of notice and hearing.

As to disabilities to other employment, this Court in *Ro*
stated that some proof beyond the mere inference that
teacher's "record of nonretention in one job, taken alone, mig
make him somewhat less attractive to some other employers .
[is necessary to] establish the kind of foreclosure of opportu
ties amounting to a deprivation of 'liberty'," 408 U. S. at 5
n. 13. The absence of even prima facie proof of any such for
closure of other employment opportunities caused the tri
court to direct a verdict for respondents, sustained on appe
with respect to petitioner's allegation that the respondents h
conspired to deny him other employment. [Petition, 8a-9a.]

The petitioner argues that even if his disagreements wi
his colleagues did not in themselves impose a stigma or di

ability, the fact that he was not scheduled for classes did so. Questionable as this argument is simply as a matter of fact, it would in effect give constitutional status to questions of internal university practices in areas such as class scheduling, course assignments and promotions. There is no precedent in the decisions of this Court for such a view and it would infringe seriously upon the academic freedom necessary for professors and administrators to run internal university affairs.

In any case, the Fourteenth Amendment question is not squarely presented in this case since the trial court, acting prior to the *Roth* and *Sindermann* decisions, in fact instructed the jury on the basis that petitioner was entitled to "a reasonable statement of the . . . charges against him" and "a reasonable opportunity to answer or respond or rebut them." [A. 356.] To get around this barrier, petitioner argues that this instruction did not satisfy the hearing requirements envisioned by *Roth* and *Sindermann* because it did not specify that any hearing must be "before any action was taken against him." [Petition, 23.] Yet what the cases cited in *Roth* on the hearing question actually say is that except "where some valid governmental interest is at stake" a Fourteenth Amendment hearing must be before "termination becomes effective." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971); *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). The issue at trial in this case was whether certain meetings and discussions satisfied hearing requirements. There was no contention by either side, however, that any of these meetings and discussions occurred after the effectiveness of the expiration of petitioner's contract. Thus, an instruction on this point was unnecessary.

If a hearing had been required in connection with the decision not to schedule petitioner for classes, the issue of timing might have been material, though even here there was evidence of a meeting prior to the effectiveness of the decision. [A. 256-58.] Again, however, as pointed out above, there is no suggestion in any holding of this Court that the Fourteenth

Amendment requires notice or hearing in connection with a decision as to scheduling or other matters short of termination. Moreover, due process in this connection was not an issue in the Amended Complaint, trial stipulation or proffered instructions and is for this reason beyond review here.

CONCLUSION.

The decision of the Court of Appeals is not in conflict with previous decisions of this Court, nor did it introduce any new rule of law limiting the rights of teachers. Moreover, this case does not squarely present the Fourteenth Amendment issue that petitioner seeks to have reviewed. Therefore the respondents respectively submit that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

vs.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE and ROBERT BULLINGTON,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Rather than replying to Petitioner's arguments in support of the Petition for Writ of Certiorari, respondents have resorted to unfounded statements that the issues presented in the Petition are not properly before this Court, as if to imply that they were not presented or considered by the Courts below. The record in this matter shows that such contentions are not well-founded.

Respondents first state that the issue concerning the removal of Petitioner from the classroom in mid-year was not raised below. This is not supported by the record. Plaintiff testified to the facts surrounding his removal from the classroom. (Tr. 93-102) The subject was also discussed in the opinion of the Court of Appeals. (See p. 3a, Petition for Certiorari.)

The contention most germaine to the issue raised herein is the extent to which teachers hold First Amendment rights insofar as their classroom conduct is concerned. Are the constitutional rights of teachers to be wholly determined by their superiors? Are teachers, not under tenure, to be subject to every whim and caprice of jealous colleagues who couch their actions in terms of professional judgments? If so, this Court's pronouncement that the classroom is the "market place of ideas" is an empty gesture.

Respondent's argument that they were only exercising their First Amendment rights is pure sophistry. Their statements were made in support of adverse action taken against Petitioner. They did not merely meet his criticisms in the same milieu in which those criticisms were made. Rather, their statements were made in support of depriving plaintiff of his opportunity to a renewal of his contract to teach, and in support of the drastic action of removing him from the classroom in mid-year. To attempt to equate their statements with those of Petitioner is sophistry.

Furthermore, the District Court and Court of Appeals did not balance the interests of the parties and find that the petitioner's rights were outweighed by other consid-

erations, but flatly held that "Instructions on the First Amendment rights of public school teachers were inapplicable to this case", and that "There was no First Amendment issue appropriate for consideration by the jury." This is tantamount to saying that once a school teacher enters the classroom he is at the mercy of his superiors, and that he must leave his rights to freedom of speech outside the classroom door. This Court has never sanctioned such an attitude in this sensitive area, quite the contrary.

In responding to the due process branch of this case, respondents raise the spurious argument that disputes such as are raised in this cause are not amenable to solution through the processes of notice and hearing. This is tantamount to admitting that they would be unable to support and justify their decision to an impartial arbiter were petitioner given an opportunity to respond, and thus have both sides of the question heard. The assertion that the charges levelled at petitioner were professional rather than personal is a specious one. The only charge that could be placed into the category of a professional criticism was that he overemphasized sex in his health survey course. The charges that petitioner counselled an excessive number of students, and did so with his office door closed, and that he belittled other staff members are personal charges, not professional disagreements concerning his method of teaching. These are all matters which are either true, or not true. They are not issues which call for value judgments, but rather for a search for the truth.

Respondents' further argument that there is an absence of prima facie proof of damage to petitioner's reputation,

and a foreclosure of other employment opportunities is similarly not supported by the record. Defendant Geigle admitted, on the witness stand, that it is drastic and unusual to relieve a teacher of classes at the beginning of a new semester, in mid-year. (Tr. 700) Defendant Skok testified that the decision was made that the administration of the Department in which petitioner was employed had reached the conclusion that they could not permit plaintiff to continue having contact with students. (Tr. 746-47) Such highly unusual actions are in themselves so obviously damaging to a teacher's reputation, both personal and professional, as to require no further "proof" of damage.

Finally, contrary to the assertions of Respondents, the due process issue is squarely presented by this cause. The instructions of the trial court to the jury on this issue left it to the jury to determine the kind of hearing to which petitioner was entitled. The jury was directed that in order to find for petitioner, it must conclude that plaintiff had proved that "he was entitled, as a right under the Constitution, to more opportunity to give his side than, in fact, he was afforded. That is, that he was not given an opportunity to learn what the charges were, or an opportunity to refute them, which was reasonable under all of the circumstances." (Tr. 1033) This is tantamount to no instruction at all, for a jury cannot be left to its own devices in determining what is required by the Constitution. This is clearly a judicial function.

CONCLUSION.

The decision of the courts below in this matter represent a retreat from the principles laid down by this Court in the rights afforded teachers. The effect of these decisions is that a teacher has no First Amendment rights once he steps into the classroom, and that whether he is to be afforded a hearing on charges which obviously damage his personal and professional reputation is to be left to the unfettered discretion of the jury, rather than defined by the law. Such a dangerous precedent cannot be allowed to stand.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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